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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1685

CBS INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (KELLEHER, D.J.), UNITED STATES OF AMERICA and NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

ROBERT S. RIFKIND
GEORGE VRADENBURG III
STUART W. GOLD
HENRY B. GUTMAN
L. DONALD PRUTZMAN, JR.
One Chase Manhattan Plaza
New York, N.Y. 10005

JOHN D. APPEL
CBS Inc.
51 West 52nd Street
New York, N.Y. 10019

LLOYD N. CUTLER
JOHN H. PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The most noteworthy aspect of the opposing briefs of the United States and NBC* is that neither anywhere addresses the central thrust of the CBS petition—that the District Court approved a decree which was manifestly *anticompetitive* and, hence, incompatible with the requirement of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), that the decree be found to be "in the public interest". This gaping omission dramatizes the importance of the questions concerning the proper interpretation and application of the APPA presented by the petition.

Instead of addressing those questions, respondents resort to unsound technical arguments regarding the right of nonparties to seek review, and to a cramped reading of the APPA which is belied by its language and legislative history. For these and other reasons elaborated below, the arguments in opposition are unpersuasive.

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* Those briefs are referred to herein as "U.S. Br." and "NBC Br.", respectively.

1. Respondents' Claim That There Was No Abuse of Discretion Because the Anticompetitive Nature of the Decree Is Irrelevant Under the APPA.

CBS's petition demonstrated, citing the unrebutted affidavits from several distinguished economists and commentators presented to the District Court, that the proposed decree was contrary to the public interest because, *inter alia*, it would operate to drive up prices paid to producers of television programming by restraining competition among them, in square conflict with the procompetitive policies declared by the Sherman Act. (Petition, pp. 13-16)

The only response of the Department of Justice is that "[p]etitioner's complaint . . . that the consent judgment is contrary to the public interest because it will diminish potential competition in program supply amounts to a request that the case proceed to a trial on the merits, the very thing a consent judgment is designed to avoid." (U.S. Br., pp. 5-6)

In other words, according to the Department:

> (1) the Department does not deny that the decree may in fact be anticompetitive;
>
> (2) however, it was not practical for the District Court, short of a full trial on the merits, to determine whether the decree is anticompetitive; and
>
> (3) therefore, the District Court could properly find the proposed decree to be in the public interest even if it is anticompetitive.

Surely this is an extraordinarily perverse position for the government agency entrusted with the vigorous enforcement of the procompetitive policies of the antitrust laws to be taking. The Department's conclusion disregards the APPA's clear requirement of an informed judicial determination that the decree is in the public interest, rather than a passive

acceptance of the Department's preconceived views as to appropriate relief. Moreover, the minor premise of the Department's specious syllogism is erroneous because the required determination can be made without proceeding to a full trial on the merits. Sensible utilization of the panoply of procedures specifically made available to the District Court under the APPA (15 U.S.C. § 16(f)), including the conduct of an evidentiary hearing, permit a sharply focused inquiry into the consequences of the proposed decree. The issue to be addressed in that inquiry—whether the decree is anti-competitive *vel non*—is different from and much narrower than the issues framed by the pleadings—whether NBC violated § 1 and § 2 of the Sherman Act.

Furthermore, the Department's argument of inconvenience ignores petitioner's contention that the decree is anticompetitive on its face (and as explicated by the Department's Competitive Impact Statement). If that contention is sound, then no further proceedings were required; the decree simply had to be rejected as a matter of law. In all events, since the only evidentiary material before the District Court was the decree itself and the affidavits submitted by petitioner clearly showing that the decree was anticompetitive, further proceedings were required only if the Department wished to try to rebut petitioner's claim. Absent some countervailing evidence, the court was required to reject the decree since the preponderance, indeed all, of the evidence in the record before it tended to establish its anticompetitive character.

True it is that consent decrees are meant to avoid full trial on the merits of alleged violations of the antitrust laws. But it is not true, at least since the enactment of the APPA, that a consent decree can pass muster in the face of unrebutted sworn testimony as to its anticompetitive nature without further rigorous examination by the dis-

trict court.* Even though the District Court here had earlier conceded that CBS's contention required a "major inquiry", the court avoided any such examination.

NBC's response does not make any effort to rebut CBS's contentions that the decree is anticompetitive. Instead, NBC argues, without elaboration, that the decree was a "reasonable compromise" in light of the arguments of program suppliers that the decree was "not sufficiently

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* The need for such examination has been recognized by the Department in less partisan circumstances. The Assistant Attorney General in charge of the Antitrust Division testified at the Senate hearings on the bill:

> "in some instances [the APPA] could *require* a full hearing prior to approval of consent decrees, involving the subpena [sic] of documents and witnesses, and the taking of sworn testimony concerning . . . *the anticipated effects of the proposed judgment* . . . .
>
> ". . . .
>
> "Disagreement over remedy frequently reflects disagreement over facts. *Disagreement over facts requires judicial resolution, and that in turn requires a full evidentiary hearing.*
>
> ". . . .
>
> "Any discussion of the long-term effects of a judgment also involves a great deal of 'crystal ball gazing.' If done in the abstract, the discussion is likely to be useless. To avoid abstraction, *detailed facts must be presented to the court.*" The Antitrust Procedures and Penalties Act: Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 93d Cong., 1st Sess. 89, 93 (1973) (Statement of Hon. Thomas E. Kauper, Assistant Attorney General, Antitrust Division, United States Department of Justice) (emphasis supplied).

The Deputy Assistant Attorney General made similar remarks in the House hearings on its version of the APPA. Bruce B. Wilson testified that under the statute:

> "the Court would consider itself obligated to evaluate and could take testimony concerning, the anticipated effects of the relief contained in the proposed judgment. This inquiry would encompass not only whether the relief is adequate in view of that sought in the complaint, but whether the Government sought appropriate relief in the complaint itself."

Consent Decree Bills: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 93d Cong., 1st Sess. 61, 62, 86-87 (1973). (Statement of Hon. Bruce B. Wilson, Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice).

restrictive" and those of CBS that it was "too restrictive." (NBC Br., p. 11) NBC, of course, misconstrues CBS's position. CBS argued, not that the decree was "too restrictive", but that it was fundamentally misconceived in that it would restrain competition and drive up prices, a result totally antithetical to the purpose of the laws the decree would ostensibly enforce. But, no matter how "reasonable", the decree cannot be found in the public interest notwithstanding its anticompetitive nature simply because it was the result of "compromise".

In like vein, NBC seeks to justify the District Court's approval of the decree by citing judicial observations that " 'a court's powers to do very much about the terms of a particular decree' " are limited. (NBC Br., p. 10 *quoting United States* v. *Associated Milk Producers, Inc.*, 394 F. Supp. 29 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied sub nom. National Farmers Organization* v. *United States*, 429 U.S. 940 (1976)). But, of course, CBS did not request that the Court *change* the terms of the decree; it requested that the Court *reject* them outright as anticompetitive.

Accordingly, it is most inappropriate for respondents to take refuge, as they do, in the half-hearted argument that mandamus does not lie against a district judge in the absence of a "gross abuse of discretion." (*e.g.*, U.S. Br., p. 5) For a district court to saddle a major industry with a scheme of regulation subversive of the purposes of the Act it intended to enforce is surely a gross abuse. To do so without making the slightest effort to obtain evidence that could support the conclusion that the decree is in the public interest is grosser still. In all events, it is well settled that mandamus is available to correct clear abuse of discretion by a district court. *See, e.g., Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964); *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 257 (1957); *Goldblum* v. *National Broadcasting*

Co., 584 F.2d 904, 906 n.2 (9th Cir. 1978). And entry of this decree as consistent with the public interest in the teeth of unrebutted and sworn proof of its anti-competitive character—not denied by either respondent— was just such a clear abuse of discretion.*

2. Respondents' Argument That Mandamus Is Not Available Because CBS's Exclusive Remedy Was by Way of Intervention.

Citing well-known precedent that mandamus will not issue when another adequate remedy is available, both respondents argue that CBS can obtain whatever relief it is entitled to by way of intervention. (U.S. Br., p. 5; NBC Br., pp. 6-8) As noted in the petition for certiorari (p. 7) CBS timely moved to intervene in the District Court proceedings following filing of the proposed decree and Competitive Impact Statement, but the District Court denied that motion. On June 4, 1979 (after the instant petition had been filed with this Court), the Court of Appeals for the Ninth Circuit affirmed that denial.** The Court of Appeals reasoned that intervention as of right was inappropriate because CBS's interest had been adequately represented by the Department of Justice. It is not apparent how the Court of Appeals could rationally conclude that CBS was adequately represented by the Department inasmuch as (1) CBS sought the status of intervenor precisely to establish that the Department was proceeding in dereliction of its mandate under the Sherman Act and

* It is clear as well that an abuse of discretion by the Court of Appeals in declining (without explanation) to entertain the petition for mandamus can be corrected by certiorari in this Court. *See, e.g., United States* v. *Nobles*, 422 U.S. 225, 241-42 n. 16 (1975); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 396-97 (1959).

** The Ninth Circuit's memorandum decision affirming the denial of CBS's motion to intervene is unreported. It is set forth at pp. A-18 to A-25 in the blue covered Appendix ("Appendix II") to CBS's separate petition for certiorari ("Petition II") filed this day seeking review of that decision. That Appendix is cited herein as "App. II ".

(2) the Department is CBS's adversary in a companion case* [*United States* v. *CBS Inc.*, Civil No. 74-3599-RJK (C.D. Cal.)]. CBS is today filing with this Court a petition for certiorari seeking review of that decision of the Court of Appeals.**

It is sufficient to note here that, in the present posture of the case, a determination by this Court that intervention should have been granted, particularly if coupled with guidance to the District Court as to the substantive and procedural standards to be applied in complying with the APPA, would furnish adequate relief. However, a determination that denial of intervention was proper should not affect consideration of the merits of the instant petition. As pointed out in the petition for certiorari (p. 24), the CBS petition for mandamus rests on considerations altogether different than those involved in the intervention appeal. Irrespective of the scope and nature of the right to intervene, the APPA expressly recognizes that non-intervening "interested persons" have a significant public interest role to play in proceedings at the district court level.

* This adversary relationship clearly rebuts any presumption that in government antitrust cases the Department adequately represents the interests of absent persons. For it is hornbook law that representation by an adverse party cannot be considered adequate. *See, e.g., Stadin* v. *Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir. 1962) (Blackmun, J.), *cert. denied*, 373 U.S. 915 (1963); *Brennan* v. *UAW Community Action Program*, 19 Fed. R. Serv. 2d 117, 122 (D. Conn. 1973); 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1909, at 523-24 (1972). Not only is such representation inadequate, it is unethical. *See Joseph Skillken & Co.* v. *City of Toledo*, 528 F.2d 867, 876 (6th Cir. 1975), *vacated on other grounds and remanded*, 429 U.S. 1068 (1977).

** Because of the importance of the underlying issues as to the proper interpretation and enforcement of the APPA, we urge this Court to review both petitions together to facilitate consideration of all appellate remedies available to assure compliance with the APPA.

Furthermore, to focus on the status of the case at the early stage when intervention was sought may improperly restrict the inquiry as to all relevant circumstances bearing upon the propriety of entry of the decree. The District Court's denial of intervention was coupled with an undertaking thereafter to conduct a "major inquiry" as to whether the decree would have an anticompetitive effect in the television industry. (Petition, p. 8) The District Court's failure—*subsequent* to the denial of intervention—to conduct any such inquiry whatsoever and its approval of the decree merely because it was consistent with the purpose of the Department of Justice in filing the complaint were not in issue on the appeal from the denial of intervention, but were raised by the petition for mandamus and this petition for certiorari.

3. Respondents' Argument That CBS as a Nonparty Has No Appellate Rights.

CBS's petition showed (p. 24) that mandamus is available to aggrieved nonparties, citing *United States* v. *Sherman*, 581 F.2d 1358 (9th Cir. 1978), and *CBS Inc.* v. *Young*, 522 F.2d 234 (6th Cir. 1975), two cases wherein such relief was afforded.

The Department is wrong in contending that "nonparties cannot seek appellate review by mandamus" and in its attempts to distinguish the *Sherman and Young* cases. (U.S. Br., pp. 4-5) Contrary to the Department's assertion, mandamus was not granted in those two cases because petitioners therein were "addressees" of the orders involved. Both cases found standing to obtain mandamus solely because the petitioners met the two requirements for standing enunciated by this Court in *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970); each alleged that the challenged action had caused it "injury in

fact", 397 U.S. at 152, and each was "arguably within the zone of interests to be protected or regulated by the statute . . . in question", 397 U.S. at 153. *See United States* v. *Sherman, supra*, 581 F.2d at 1360-61; *CBS Inc.* v. *Young, supra*, 522 F.2d at 237-38.*

CBS meets both requirements here. The restraint of competition among program suppliers procured by the consent decree injures CBS's interests as a major buyer of programs. *See Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 135-36 (1967). And protection of its interests in buying in a competitive market is clearly "arguably within the zone of interests . . . protected or regulated" by the APPA and by the Sherman Act itself.

NBC's attempted distinctions are similarly without merit. Its contention that mandamus in *Sherman* rested on First Amendment considerations has no support in the cases** and ignores the fact that CBS has explicitly urged

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* Moreover, the Department is incorrect when it characterizes the petitioners in *Sherman* and *Young* as "addressees". The order at issue in *Young* was addressed neither to CBS Inc. by name nor to the press in general, but to counsel, court personnel, the parties and their relatives, friends and associates. 522 F.2d at 236, 238, 239. And, as the court noted in *Sherman*, the "trial judge's statement that his order applied to 'everyone' including the news media is insufficient to make the Seattle Times [petitioner therein] a party". 581 F.2d at 1360. Noteworthy in this regard is another case wherein nonparties who were not "addressees" successfully obtained mandamus, *Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi* v. *Martin*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) (action for injunctive and declaratory relief against judge's order in another action treated as petition for mandamus to correct that order).

** NBC focuses exclusively on *Sherman*, noting that *Sherman* held explicitly that appeal was not therein available, and that that case "involved a major First Amendment question, with no countervailing policy considerations". (NBC Br., pp. 7-8 n.6) NBC does not mention the *Young* case, which, of course, did not contain any dis-

that the decree imposes a prior restraint on speech impermissible under the First Amendment. (Petition, p. 9; App. 67a) Further, its contention that there is nothing in the history of the APPA to support a claim for appellate involvement either by mandamus or otherwise (NBC Br., p. 11) is readily refuted. Senator Tunney, co-sponsor of the APPA in the Senate explained the design of the bill in terms that demonstrate that review is called for here because of the District Court's failure to follow the requirements of the APPA:

> "The decision to make those procedures discretionary is dictated by a desire to avoid needlessly complicating the consent decree process. There are some cases in which none of these procedures may be needed. *On the other hand, there have been and will continue to be cases where the use of many or even all of them may be necessary. In fact, in a very few complex cases, failure to use some of the procedures might give rise to an indication that the district court had failed to exercise its discretion properly.*
>
> "Second, the procedures are not meant to be exclusive. Rather, they are designed as guides for the courts to follow. To a considerable extent, they serve as safe harbors for a court to look to when faced

cussion of the availability of appeal or intervention but did consider the countervailing policy, the right to a fair trial, at issue therein.

Although the above cases involved the assertion of First Amendment rights by the petitioners, none of them even remotely suggests that standing for mandamus differs in the First Amendment context. Indeed, none of the cases cites any First Amendment authority whatsoever in finding that the petitioners therein had standing to seek mandamus. Moreover, at least one court of appeals has implied that mandamus is available to a nonparty in a non-First Amendment context if the purpose for which mandamus is sought is sufficiently important. *See Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979).

> with a difficult case. *By following one or more of the procedures contained in this provision* [15 U.S.C. § 16(f)], *an individual judge can develop the data he needs without fear that he is embarking upon an untried and perhaps reversible journey.*" 119 Cong. Rec. 3453 (1973) (remarks of Sen. Tunney) (emphasis supplied).

4. Respondents' Contention That the Decree Causes "No Immediate Harm" to CBS.

Finally, respondents argue that CBS should not be concerned by entry of the decree because those portions as to which it objects will not come into effect unless similar relief is obtained against CBS in the pending action brought against it. (U.S. Br., p. 6; NBC Br., p. 8)

This reliance on the conditional deferral of certain provisions of the *NBC* decree is misplaced. In the first place, under Section VII of the proposed decree, some of the provisions of the decree go into effect promptly after its entry (Sections IV(A) and (B); VI(A), (B), (D), (E)(ii) and (iii)). Moreover, to the extent NBC begins to conform its practices to the decree in anticipation of the other provisions (Sections V; VI(C), (E)(i), (F), (G) and (H)) coming into effect, the decree will tend to establish a standard, industry-wide pattern of practice. The promulgation and judicial approval of the decree is likely to have an immediate impact even though enforcement of some provisions is deferred. *Cf. Plymouth Dealers' Ass'n* v. *United States*, 279 F.2d 128 (9th Cir. 1960) (publication of suggested retail prices illegal even though only suggestions of the point at which bargaining was to begin).

Furthermore, under the APPA the District Court had to determine whether the decree in its entirety was "in the public interest" as a condition precedent to its entry. In-

deed, the District Court has now held that the decree satisfies the public interest standard without qualification or caveat. It would obviously have been wholly inappropriate for the District Court to have made that determination if, for whatever reasons, it was not satisfied on the question and was relying, sub silentio, on the possibility that further proceedings in *United States* v. *CBS* or *United States* v. *ABC* would resolve the doubt or preclude the operations of some provisions of the *NBC* decree. It cannot be assumed that the District Court engaged in a purely hypothetical exercise when it held that entry of the *NBC* decree was "in the public interest". Proceedings with respect to the decree in this action are the proper occasion to determine whether this decree does violence to the public policy declared by the Sherman Act as CBS claims. Where, as here, anticompetitive effects of grave significance to CBS are demonstrated, that determination cannot be deferred to another proceeding at another time. *See Denver & R.G.W.R. Co.* v. *United States,* 387 U.S. 485, 501-07 (1967).

The District Court's further explanation that "disposition of the proposed decree will not have a *stare decisis* effect on the CBS litigation" (Memorandum of Decision and Order dated June 20, 1977, denying CBS's motion to intervene, App. II A-16) only confuses matters still more. The District Court based this curious conclusion on the fact that "the NBC case now involves a consent decree, which by its express terms does not bind the parties to any adjudication or admission of fact or law".* (App. II A-16). The court was apparently confusing the doctrines

* The decree recites that the United States and NBC have:
". . . consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or admission by any party with respect to any issue of fact or law in any action or proceeding . . ." (App. 20a).

of stare decisis and res judicata.* Whatever the effect of the decree as between the United States and NBC and whatever its evidentiary significance as against NBC in future proceedings, the District Court's determination that a decree of this character is in the "public interest" is a not unimportant precedent. To the extent that other district courts are disposed to adhere to the doctrine of stare decisis, the public interest determination here will stand as precedent, however ill-advised.

Moreover, it would be ignoring the obvious not to recognize that substantially similar decrees are sought by the plaintiff in its actions against CBS and ABC, which are pending before the same district court judge, on complaints virtually identical to that in *United States* v. *NBC*. Obviously the public interest determination here has major significance for critical issues in those actions. It is simply not credible that the District Court will not regard its own public interest determination in this action as a weighty consideration in the two other network actions. When CBS seeks to show in *United States* v. *CBS* that network program production is procompetitive, only amnesia would lead the District Court to disregard that which it had done before.** The establishment of such precedent in these circumstances is an immediate injury.

* The determination that this decree is "in the public interest" may have stare decisis effects regardless of whether the parties are "bound":

> "[T]he doctrine of stare decisis does not depend at all on res judicata; it accepts a former decision as controlling because the conclusions reached and the reasoning used therein are applicable to the case at bar". IB J. Moore, *Federal Practice* ¶ 0.402, at 56 (1974) (footnotes omitted).

** *See Transcontinental Gas Pipe Line Corp.* v. *Federal Energy Regulatory Comm'n,* 589 F.2d 186, 187-90 (5th Cir. 1979) (condition included in pipe line certificate of public convenience and necessity, which would not come into effect until later issuance of rate order, was ripe for review where appellant argued that agency would likely adhere to earlier ruling and include condition in rate order).

CONCLUSION

The petition and the two briefs in opposition set forth perceptions of the proper purpose and scope of the APPA that are poles apart. In petitioner's view, the statute requires an adjudication as to whether a decree is in the public interest based on a meaningful inquiry into the bases for the assurances of the settling parties that a proposed decree is consistent with the public interest, particularly where a substantial and unrebutted showing has been made of its essentially anticompetitive character. The commitment of such adjudicatory power to the district courts presupposes some appellate review and correction of clear error. Respondents, on the other hand, urge the Court to construe away the plain language of the statute, disregard the procompetitive purposes which it was intended to promote, and recreate insofar as possible the permissive standards of pre-APPA days when a district court could comfortably affix its unreviewable imprimatur on a decree upon the mere say-so of the Department of Justice that the decree was consistent with whatever the Department's objectives might be.

This petition, and CBS's petition seeking review of the Court of Appeals' affirmance of the District Court's denial of intervention, present this Court with an unusual opportunity carefully to consider the nature of the appellate remedies available to ensure the proper enforcement of the APPA, a major but as yet little-construed statute of enormous importance in promoting a procompetitive economy. Accordingly, we respectfully urge that this Court

consider this petition and CBS's petition on the intervention issue together, and that both petitions be granted.

August 28, 1979

Respectfully submitted,

ROBERT S. RIFKIND
GEORGE VRADENBURG III
STUART W. GOLD
HENRY B. GUTMAN
L. DONALD PRUTZMAN, JR.
One Chase Manhattan Plaza
New York, N. Y. 10005

JOHN D. APPEL
CBS Inc.
51 West 52nd Street
New York, N. Y. 10019

LLOYD N. CUTLER
JOHN H. PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006